

DOL Issues Final Rule Permitting Use of Non-Salary Compensation under ‘Fluctuating Workweek’ Pay Method

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On May 20, 2020, the U.S. Department of Labor (DOL) issued a Final Rule expressly permitting employers to provide additional pay, such as bonuses, commissions, or premiums, to employees when utilizing the “fluctuating workweek” (FWW) pay method under the Fair Labor Standards Act (FLSA), without jeopardizing the use of that pay method.

Prior to this, uncertainty regarding the application and requirements to properly implement the FWW often caused employers to shy away from using this method of paying for overtime.

The Final Rule, which will go into effect in about 60 days, adopts the DOL’s view prior to 2011, with some further clarifications. With its implementation, employers will have greater flexibility in fashioning compensation programs for their employees, with less concern over the litigation and divergent court decisions that followed in the footsteps of the current rule.

Background of the FWW Pay Method

The FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under certain conditions, an employer may use the FWW method for computing any overtime compensation due. Specifically, if a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all “straight time” (non-overtime) hours the employee works, the employer satisfies the FLSA’s overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the “regular rate” of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a “clear and mutual understanding” that the salary will remain the same regardless of the hours worked each week.

Prior to 2011, the DOL had never explicitly forbidden employers from paying bonuses, premiums, or other compensation beyond the minimum salary to employees who were compensated under the FWW method. On the contrary, in a 2008 Notice of Proposed Rulemaking (NPRM) and in a 2009 opinion letter, the DOL stated that such bonuses were consistent with the FWW method. When the Obama-era DOL issued a Final Rule in 2011, however, it concluded in the Rule’s preamble that such additional payments were not permissible under the FWW method because they were in contradiction to the notion of a “fixed” salary and presumably were inconsistent with the 1942 decision of the Supreme Court from which the FWW method originated. Since 2011, and contrary to the DOL’s belief espoused in the 2011 Rule, courts reached inconsistent conclusions as to whether such additional compensation is permitted under the FWW pay method. As a result, some

courts permitted so-called production bonuses but not hours-based bonuses under the FWW pay method, a distinction the DOL has never made.

In November 2019, the DOL issued an NPRM setting forth the reasons why it found unpersuasive the reasoning of the 2011 Final Rule's prohibition on the use of additional compensation under the FWW method, as well as why it believed some minor clarifications were necessary regarding the language of that rule. Following a month-long public notice-and-comment period and consideration of the comments made during that period, the DOL has now issued its Final Rule, "clarif[ying] that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate as appropriate under the [FLSA]." In addition, the Final Rule incorporates examples of how to properly calculate pay under the FWW method when such additional compensation is involved, as well as several other clarifications that should enable employers to better understand and potentially implement the FWW pay method. Some of the more notable clarifications include:

- In response to comments submitted by Jackson Lewis P.C. and others, the Final Rule expressly clarifies that the FWW pay method's requirement that an employee's hours "fluctuate from week to week" does *not* require fluctuation both above *and* below 40 hours per week, as some courts have held. Rather, noted the DOL, it "has long held the position that there is no requirement that the employee's hours of work must fluctuate below forty hours per week. The Department has consistently stated that the fluctuating workweek method remains appropriate even when it is only the number of overtime hours that fluctuate." To ensure that no further confusion exists, the DOL expressly states that "the regulation does not require that an employee's hours must sometimes fluctuate below forty hours per week, so long as the employee's hours worked do vary."
- The Final Rule clarifies that the use of the FWW pay method is "not invalidated by occasional and unforeseeable workweeks in which the employee's fixed salary did not provide compensation to the employee at a rate not less than the applicable minimum wage, so long as the fixed salary was reasonably calculated to compensate the employee at or above the applicable minimum wage in the foreseeable circumstances of the employee's work." The Final Rule cautions, however, if the employer could have foreseen that the salary would not at least equal the applicable minimum wage in all workweeks, or if this requirement does not occur "with some degree of frequency," either the employer and the employee must reach a new understanding as to the number of expected work hours or the amount of fixed salary (or both), or the employer must use a different pay method. And of course, under the FWW method, during any week that the fixed salary failed to meet the applicable minimum wage, the employer must make up the difference.
- While declining to dispense with the "clear and mutual understanding" requirement as proposed by some commenters, the Final Rule emphasizes that the requisite understanding applies only to the fact that the employee's fixed salary is intended to cover all hours worked, "[not] that the employee needs to fully understand the precise payroll method by which his or her overtime compensation is calculated." As one court cited in the Final Rule has noted, "[a]n employee does not have to understand every contour of how the fluctuating workweek method is used ... so long as the employee understands that his base salary is fixed regardless of the hours

worked.” *Garcia v. Yachting Promotions, Inc.*, 662 Fed. Appx. 795, 797 (11th Cir. 2016) (per curiam).

- In comparison to the NPRM, the Final Rule provides more (but non-exhaustive) examples of the types of additional compensation that may be included while using the FWW method, specifically stating that “any bonuses, premium payments, *commissions, hazard pay*, or other additional pay of any kind” may be included (emphasis added).
- The Final Rule rejects the proposal of some commenters to associate the term “fixed salary” with the “salary basis” requirement applicable to the executive, administrative, and professional (“EAP” or “white collar”) minimum wage and overtime exemptions under 29 U.S.C. 213(a), noting that the DOL has consistently held that the permissible deductions from salary set forth in the regulations relevant to these exemptions are inapplicable to the FWW method.

The Takeaway

The Final Rule provides much-needed clarification, both for employers seeking to further reward productive employees and for the non-exempt, salaried employees who will be eligible to receive such additional compensation. Furthermore, the DOL’s clarification of several related issues, such as whether an employee’s hours must fluctuate both above and below 40 in a workweek (they do not) and whether employees must grasp the nuances of the FWW pay method for a “clear and mutual understanding” to exist (they do not), should further enhance the use of the FWW pay method as an alternative to more traditional pay methods. As the Final Rule itself notes, this may become even more important in the workplace following the COVID-19 pandemic, as “[s]ome employers are likely to promote social distancing in the workplace by having their employees adopt variable work schedules, possibly staggering their start and end times for the day” and the new Final Rule “will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums they would otherwise earn.”

If you have any questions about the Final Rule, the fluctuating workweek in general, or any other wage and hour questions, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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